

Center for Public Policy Dispute Resolution

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November 7, 2000

Jeffrey M. Senger

Deputy Senior Counsel for Dispute Resolution

United States Department of Justice

950 Pennsylvania Ave. NW, Room 4328

Washington, D.C. 20530

Re: Comments to Report on Confidentiality in Federal Alternative Dispute Resolution Programs

Dear Mr. Senger:

Enclosed please find comments of the Texas Center for Public Policy Dispute Resolution to the Report on Confidentiality in Federal Alternative Dispute Resolution Programs. Although the notice requested comments by November 1st, it is our understanding that the Council may consider comments submitted by Wednesday of this week. We would hope that our comments are considered and wish to thank you for bringing them to the Council's attention.

Sincerely,



Suzanne Formby Marshall

Deputy Director

Enclosure

**COMMENTS OF THE TEXAS CENTER FOR PUBLIC POLICY DISPUTE
RESOLUTION ON
REPORT ON THE REASONABLE EXPECTATIONS OF CONFIDENTIALITY UNDER
THE ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996
(65 FEDERAL REGISTER 59,200, OCTOBER 4, 2000)**

The Center for Public Policy Dispute Resolution at the University of Texas School of Law submits these comments to the Department of Justice/Federal Alternative Dispute Resolution Council on the Report on the Reasonable Expectations of Confidentiality Under the Administrative Dispute Resolution Act of 1996.

The Center is a University-based organization that promotes the appropriate use of alternative dispute resolution by Texas governmental entities and provides ADR education, training, and research to the University of Texas community and the citizens of Texas.

The Center is especially interested in the Council's Report on Confidentiality due to a conflict which arose between the U.S.D.A.'s Office of Inspector General and the Texas Agricultural Mediation Program in the mid-1990's. This conflict developed when the Office of Inspector General sought to obtain mediation files from the program and the director of the program objected to providing confidential information from the mediation program. The Center's comments are specifically directed to question 15 of the General Confidentiality Rules, "Does the ADR Act protect against the disclosure of dispute resolution communications in response to requests by federal entities for such information?"

Comments:

- 1. The Council should provide more specific guidance on the issue of the ability of federal entities who provide funding to mediation programs to obtain communications which may be considered under the Administrative Dispute Resolution Act.**

The Center would first note its appreciation to the federal interagency group for developing the confidentiality report and acknowledge that a great deal of work has been spent in its development. Overall, the report is thoughtful and will serve as a valuable resource to federal (and state) agencies who maintain ADR programs. However, the Center believes that the group does not answer question 15 with enough specificity so that a state agency who participates in a federally funded mediation program, and the participants to the mediation, will know with any degree of certainty what information remains confidential in the face of a federal agency request for information.

In particular, the Texas Agricultural Mediation program serves as a good example for the type of conflict that can arise between the director of a program who seeks to maintain confidentiality and a federal Office of Inspector General who insists upon obtaining the confidential information. Because the State of Texas is once again participating in the federal agricultural

mediation program, it is important that a clear answer be reached to this question so that a similar scenario of litigation does not occur again, either in Texas or elsewhere.

The Center believes that the report's conclusion to question 15, that a tension exists between the ADR Act's confidentiality provisions and federal statutes which grant authority to request disclosure of information from federal entities (and state entities participating in federally-funded programs), is an obvious one which begs the question. While the recommendations of how to handle this resulting tension gives some good information, the report needs to go further. It should provide a legal analysis of whether, and under what circumstances, the federal ADR Act's confidentiality provisions should be held to be controlling over another state's confidentiality statute or another federal statute which authorizes obtaining information in the course of a law enforcement capacity.

Although the answer to the question may not be an easy one, nor may there be only one answer, the Center believes that more effort should be spent by the federal group to develop consensus on this issue so that a clear rule can be established for state agencies who participate in federally-funded ADR programs and courts who may be called upon to answer this question. Without a clear rule or specific guidelines, agencies and parties are left with a great deal of uncertainty as to whether there is, in actuality, any confidentiality at all in the programs. Indeed, the model confidentiality statement highlights the difficulty in stating whether the information will remain confidential.

2. **The Center believes that the specific confidentiality provisions of the ADR act should control over the general provisions of other federal statutes authorizing a federal agency or employee to obtain information that would otherwise be confidential under the Act.**

It is a canon of statutory construction that the specific controls over the general. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383, 112 S.Ct. 2031, 2036 (1992) (citations omitted). With this canon in mind, the Center would urge that the specific confidentiality provisions of the federal ADRA should control over more general provisions found in other federal statutes which grant the authority to a federal agency or employee to obtain information from federal agencies or state agencies participating in federally funded programs.

Section 574(a) of the Act prohibits a neutral from disclosing any communication from a dispute resolution proceeding, unless one of four conditions occurs.¹

¹ These conditions are: (1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing; (2) the dispute resolution communication has already been made public; (3) the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or (4) a court determines that such testimony or disclosure is necessary to: (A) prevent a manifest injustice; (B) help establish a violation of law; or (C) prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential. 5 U.S.C. § 574(a).

The Act anticipates that a court must sometimes be called upon to engage in a balancing test in which the confidentiality provisions of the Act and the resulting integrity of ADR processes are weighed against the need for information when one or more of the four conditions enumerated in the Act occur, in which case it may be appropriate to violate confidentiality. 5 U.S.C. 574(a). While the Act seeks to preserve confidentiality of ADR proceedings, the courts must be willing to observe that the Act controls in questions of whether information can be disclosed or not. This is not always the case.

In *In re: Grand Jury Subpoena Dated December 17, 1996*, 148 F.3d 487 (5th Cir. 1998), the Court found that the neither the Texas ADR Act nor the federal Administrative Dispute Resolution Act were relevant to the inquiry of confidentiality when a request for information from a state agricultural loan mediation program was sought pursuant to the Agricultural Credit Act (7 U.S.C. § 5101(c) (3)(D)).² Instead, the court looked to the confidentiality language in the Act under which the information was sought, the Agricultural Credit Act. That Act only required that a state agricultural mediation program maintained confidentiality for mediation sessions in order to qualify for federal funding. 7 U.S.C. § 5101(c)(3)(D). The Court found this requirement to be insufficient to create “an evidentiary privilege that protects information relating to mediation sessions from disclosure in grand jury proceedings.” *In re: Grand Jury*, 148 F.3d at 492. The Court ignored the confidentiality provisions of the ADRA because it found that there was no “issue in controversy” which would justify its application, although it admitted that the ADRA's confidentiality provisions were in sharp contrast to those in the Agricultural Credit Act. *Id.* We do not know what the outcome of the case would be if the Court had ruled that the confidentiality provisions of the ADRA applied in that case; however, it is precisely because this question was not answered by the court that there is a need for such an interpretation by this Council.

It is clear, then, that when a federal office asserts the authority to request and obtain information under a federal act (other than the ADRA), there is no guarantee that the courts will consistently apply the confidentiality provisions of the ADRA. The Council should continue to work on its report to fill in this gap and help reduce the tension caused by potentially conflicting federal laws. The Center would urge the Council to make recommendations to the effect that: (1) the confidentiality provisions of the ADRA apply to any federal program which uses alternative dispute resolution proceedings; 2) there should be a statutory change to the ADRA which specifically states that the Act applies to all ADR proceedings sponsored by or participated in by the federal government; 3) statutory changes be made to the Inspector General Act of 1978, 5 U.S.C.A. App. 3, and any other similar federal acts which make the authority to obtain information resulting from an ADR proceeding to be subject to the confidentiality provisions of the ADRA.

In cases in which one of the four conditions of the Act are met, a court will have the discretion to order the release of information after engaging in the appropriate balancing test. The Center

² In order to be certified as an agricultural loan mediation program, the state was required to provide that mediation sessions would be confidential. The State noted that the program would be operated under the confidentiality provisions of the Texas Alternative Dispute Resolution Act. The trial court found a conflict existed between the Texas ADR act and the federal ADRA and after learning that the mediation party had not received notice of service of the subpoena by the Office of Inspector General, granted the party's motion to quash the subpoena.

does not believe that the proposed recommendations above will unduly burden federal agencies engaged in an enforcement capacity, but will help insure the integrity of alternative dispute resolution proceedings and retain confidence in the parties who participate in them that there is meaningful confidentiality attached to the process.

3. The Center would encourage the council to work with the ABA's Section of Administrative Law and Regulatory Practice and other affected stakeholder representatives on the issues of confidentiality raised in this report.

It is the Center's understanding that this Confidentiality Report was the work product of the federal ADR steering committee, a group of subject matter experts from federal agencies with active ADR program. This group undoubtedly was able to consider this matter from the perspective of federal agency employees with responsibility for promoting and implementing ADR use within the federal sector. However, this group does not include other stakeholder representatives, such as members from the bar, private sector, and state agencies who are also affected by the federal guidelines on confidentiality.

The Center would encourage the Council to invite collaboration with other stakeholders on these confidentiality issues. Since there is currently an ABA Ad Hoc Committee on Federal ADR Confidentiality with diverse representation from the areas of interest mentioned above, the Center would encourage the Council to work with that committee and develop a report/guidelines which can be supported by both groups. The existence of two confidentiality reports (one from the federal interagency group and one from the ABA) may be confusing to the practitioner, especially if they conflict in any way.

Conclusion

Thank you for the opportunity to provide these comments to the Council. We hope they are helpful and believe they point out an area that still needs additional work. We would encourage the Council to work collaboratively with the ABA Ad Hoc Committee on Federal ADR Confidentiality on the remaining issues. We look forward to the future work product of the interagency group and thank you for your work on this report.